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Supreme Court, U.S.

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No. _____

In The
Supreme Court of the United States
October Term, 1989

PHILIP W. L. LUM,

Petitioner,

v.

RAYMOND JENSEN, ROBERT DRAKE, and
STATE OF CALIFORNIA,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

1. By 1984, had this Court established that a public employee with a property interest in continued employment was entitled to substantive due process under the Fourteenth Amendment?

2. Is a Court of Appeals bound by decisions of this Court until overruled, despite a perceived conflict among the Circuits, in determining if a defendant in an action under 42 U.S.C. §1983 is entitled to qualified immunity because his conduct did not violate clearly established law?

3. Absent binding authority, is a lower court in an action under 42 U.S.C. §1983 required to ascertain what the law in its jurisdiction would have been at the time of the alleged violation in determining if a defendant is entitled to qualified immunity because his conduct did not violate clearly established law?

4. What law is a court required to consider in determining if the conduct of a defendant in an action under 42 U.S.C. §1983 violated clearly established law?

LIST OF PARTIES/RELATED ENTITIES

All parties to the proceeding in the Court of Appeals are listed in the caption. Supreme Court Rule 28.1 concerning corporations does not apply to this petition.

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**PETITION FOR WRIT OF CERTIORARI
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Petitioner Philip W. L. Lum asks this Court to review by certiorari the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on May 31, 1989. The Ninth Circuit denied a petition for rehearing and rehearing en banc on August 11, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported. *Lum v. Jensen*, 876 F.2d 1385 (9th Cir. 1989). A petition for rehearing and rehearing en

banc were denied. *Lum v. Jensen*, No. 87-2896 (Aug. 11, 1989). The unpublished order denying rehearing and rehearing en banc is attached as an appendix to this petition.

JURISDICTION

This Court has jurisdiction to entertain this petition for a writ of certiorari from a final judgment of a Circuit Court of Appeals. 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the substantive due process guarantees of the Fourteenth Amendment and the remedy provided by Congress for violation of constitutional rights in 42 United States Code Section 1983.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of . . . property without due process of law . . ."

Title 42, Section 1983 of the United States Code provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

A. Summary of Material Facts

Petitioner Philip W. L. Lum (Lum) was employed by the State of California Department of Justice in its Salinas laboratory as a criminalist, a civil service position. *Lum v. Jensen*, 876 F.2d 1385, 1386 (9th Cir. 1989). Among his duties were forensic examination of evidence to be used in criminal cases including blood samples, firearms and drugs. His duties included testifying in court in support of conclusions he drew from these examinations.

Raymond Jensen (Jensen) was Lum's immediate supervisor and Robert Drake (Drake) was Bureau Chief of Lum's division. 876 F.2d at 1386. Relying upon information and grounds they knew were baseless and did not justify termination, Jensen and Drake terminated Lum effective May 18, 1984. *Id.* Lum appealed his dismissal and was reinstated by the California State Personnel Board (the Board). The opinion of the administrative law judge who heard Lum's administrative appeal (which was adopted by the Board) found there were no facts supporting the charges against him and many of the grounds alleged were not a legal basis for termination.

B. Summary of Procedural History

On January 26, 1987, Lum filed a complaint under 42 U.S.C. §1983 alleging violation of his right to procedural due process and related state law claims. The complaint, as amended, alleged violation of the Fourteenth Amendment's guarantees of substantive and procedural due process. Specifically, the complaint alleged Jensen and Drake had fabricated the case against him knowing some of the

charges did not justify dismissal and knowing none of them were supported by facts. Lum alleged his dismissal was arbitrary, capricious, and pretextual.

The defendants moved for summary judgment on the grounds they were entitled to qualified immunity from any damages liability. Lum moved for partial summary judgment on the grounds the Board's decision collaterally estopped the defendants from relitigating the underlying facts.

The district court ruled defendants had not denied Lum procedural due process and granted summary judgment for defendants on that claim. The district court found that, if Lum proved the defendants knew the charges against him were groundless and did not justify termination, the defendants were not entitled to qualified immunity. Defendants were denied summary judgment on the substantive due process claim. The district court denied Lum's motion for partial summary judgment on the grounds triable issues of fact prevented finding as a matter of law that his termination was arbitrary, capricious and pretextual.

Defendants filed an interlocutory appeal from the order denying summary judgment on immunity grounds. *See generally Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The Ninth Circuit Court of Appeals reversed. The panel concluded "there was no clearly established constitutional right to substantive due process protection of continued public employment" at the time of Lum's termination in 1984. *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989). The panel did not consider itself bound by *Harrah Independent School District v. Martin*, 440 U.S. 194

(1979) (per curiam), which squarely held a state employee was entitled to substantive due process from arbitrary dismissal from "tenured" employment. 876 F.2d at 1389. The panel, while conceding *Harrah* was on point, refused to follow it with the cryptic notation: "The Court, however, only summarily addressed the existence of a substantive due process right. *Id.* (emphasis added).

The panel found no binding authority entitling public employees to substantive due process protection in the Ninth Circuit. 876 F.2d at 1387 *distinguishing Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976). The panel's survey of the case law in 1984 found the substantive due process right clearly established in the Second, Fifth, Tenth and Eleventh Circuits. 876 F.2d at 1387. It found no clear law on the question in the First, Third, Fourth and Sixth Circuits, 876 F.2d at 1387-88. The panel found the Eighth Circuit had expressly noted the question was unclear. *Id.* at 1388 *citing Moore v. Warwick Public School District*, 794 F.2d 322 (8th Cir. 1986). It found the Seventh Circuit had held substantive due process did not apply to state-created property interests. *Id. citing Brown v. Brien*, 722 F.2d 360 (7th Cir. 1983).

The panel did not determine for itself what the Ninth Circuit would have done if confronted with the issue in 1984. *Cf. Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985) (in the absence of binding precedent, the court "may consider" what the Circuit or the Supreme Court would have done). Instead, the panel decided that, because the Circuits were divided on the substantive due process issue, there was no clearly established law on the question and the defendants were entitled to qualified immunity. 876 F.2d. at 1389.

Lum's petition for rehearing and rehearing en banc was denied. *Lum v. Jensen*, No. 87-2896 (9th Cir. Aug. 11, 1989).

REASONS FOR GRANTING REVIEW

THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER CLEARLY ESTABLISHED LAW GUARANTEES SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO PUB- LIC EMPLOYEES WITH A PROPERTY INTEREST IN CONTINUING EMPLOYMENT

This Court first applied Fourteenth Amendment substantive due process protections against arbitrary and capricious State action to public employees thirty-seven years ago. See *Weiman v. Updegraff*, 344 U.S. 183, 192 (1952) (exclusion from state employment for refusal to take a loyalty oath was arbitrary and capricious). See also *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) (disqualification from the right to practice law based on former membership in the Communist Party arbitrary and capricious). In the 1970s, this Court first recognized that a tenured State employee had a property interest in continued employment. See *Perry v. Sinderman*, 408 U.S. 593, 601-602 (1972).¹

In 1979, this Court applied substantive due process review to the decision to terminate a tenured teacher to determine if it was "arbitrary" under the Fourteenth

¹ It is conceded Lum had a property interest in continued employment. See *Skelly v. State Personnel Board*, 15 Cal.3d 194, 206 (1975).

Amendment. *Harrah*, 440 U.S. at 198-99. See also *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (substantive due process analysis applied to zoning); *Kelly v. Johnson*, 425 U.S. 238 (1975) (substantive due process analysis applied to "liberty" interest in personal appearance); *Thompson v. Louisville*, 362 U.S. 199 (1960) (conviction of crime with no supporting evidence violates substantive due process). This line of authority is binding on all lower courts, see, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958), and would seem to end the inquiry into clearly established law.

The Ninth Circuit, however, felt free to ignore this authority because it believed "[t]he Court . . . only summarily addressed the existence of a substantive due process right [in *Harrah*]." 876 F.2d. at 1389. The reference was "summary" presumably because this Court felt no need to rehash thirty years of precedent in a per curiam opinion. "Summary" or not, the rulings of this Court are binding until overruled and certiorari should be granted in this case to make this clear.

The First Circuit has recently held that the right of a public employee to substantive due process was indeed clearly established in 1984. See *Newman v. Commonwealth of Massachusetts*, 884 F.2d 19, 24-25 (1st Cir. 1989). The Court in *Newman*, while recognizing the perceived conflict in the Circuits noted by the panel in this case, 884 F.2d at 25, held the law was clearly established in its Circuit and therefore the defendants were not entitled to qualified immunity. *Id.* citing *McEnteggart v. Cataldo*, 451 F.2d 1109, 1111 (1st Cir. 1971) & *Drown v. Portsmouth School District*, 451 F.2d 1106, 1108 (1st Cir. 1971). The First Circuit, like the Ninth Circuit, did not feel bound by this Court's precedent: "[T]he Supreme Court several

times in the last decade has sidestepped the question of whether the Fourteenth Amendment provides substantive protection against arbitrary and capricious academic decision-making." 884 F.2d at 25 citing *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985); *Harrah; & Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978). The First Circuit, like the Ninth Circuit, did not refer to or analyze the substantive due process cases decided before this trilogy much less explain why they were not binding.

The split in the circuits perceived by the First and Ninth Circuits is illusory. All of the circuits with precedent of the issue hold public employees with a property interest in continued employment are entitled to substantive due process of law. See *McEntegart v. Cataldo*, 451 F.2d 1109, 1111 (1st Cir. 1971); *Gargiut v. Tompkins*, 704 F.2d 661, 668 (2d Cir. 1983), *vacated on other grounds*, 465 U.S. 1016 (1984); *Kowtoniuk v. Quarles*, 528 F.2d 1161, 1165-66 (4th Cir. 1975); *Thompson v. Bass*, 616 F.2d 1259, 1268 (5th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980); *Parham v. Hardaway*, 555 F.2d 139, 142 (6th Cir. 1977); *Miller v. Dean*, 552 F.2d 266, 268 (8th Cir. 1977); *Bignall v. North Idaho College*, 538 F.2d 243, 249-50 (9th Cir. 1976)²; *Brenna v. Southern Colorado State College*, 589 F.2d 475, 477 (10th Cir. 1978); *Barnett v. Atlanta Housing Authority*, 707 F.2d 1571, 1577 (11th Cir. 1983).

² The Court in *Bignall* stated the complaint raised the issue of substantive due process. 538 F.2d at 244-45. Relying on *Perry v. Sinderman*, the Court found that the representations made to Bignall established a form of implied or *de facto* tenure. 538 F.2d at 246. One of the "promises" which created this tenure

(Continued on following page)

Brown v. Brien, relied upon by the Courts of Appeals in *Lum* and *Newman* to find a conflict among the circuits, does not deny substantive due process rights to public employees with a property interest in continued employment. The Court in *Brown* held that, while a tenured employee had a property interest in continued employment, every breach of his employment agreement was not a deprivation of a property interest. 722 F.2d at 364-65. The "property" in *Brown* was compensatory time off. 722 F.2d at 363. The Court held state-created contract rights received substantive due process protection if they were a form of property and a right to compulsory overtime was not "property". 722 F.2d at 366-67.

(Continued from previous page)

was that Bignall would only be terminated because of financial exigency. *Id.* at 249. The Court then addressed whether or not the College's statement that Bignall was being fired because of financial exigency was arbitrary or a pretext.

Assuming for present purposes only that the Bignalls stated a *prima facie* case that the College fired her in violation of her *de facto* tenure rights, the College bore the burden of proving that there was a financial exigency and that Schuler [the College president] adopted and used a uniform set of procedures for all faculty. 538 F.2d at 249.

The Court then examined evidence which demonstrated the College indeed suffered from financial difficulties (the reason given was not a pretext) and all faculty members had been subjected to the same evaluation when the College picked those persons who were to be terminated (the standards for termination were not arbitrary). 538 F.2d at 249-50. The Court then concluded "the College non-retained Mrs. Bignall for valid, constitutionally permissible reasons." 538 F.2d at 250. This reflected the Court's conclusion that substantive due process guarantees had been observed.

Even in the Seventh Circuit, continuing employment is property since the Supreme Court has squarely held this. Even under its restrictive view of property, the Seventh Circuit would apply substantive due process to termination of a tenured employee. *Cf.* 722 F.2d at 363 (conceding due process applies to property interest in continuing employment).

Nonetheless, the Courts of Appeals are clearly split over whether a right to substantive due process for public employees with a property interest in continued employment is clearly established. This split represents more than a difference of opinion in the Circuits; it reflects a failure, if not refusal, to recognize this Court's earlier clear precedent as binding. In addition, the split creates the anomalous situation that one circuit recognizes substantive due process rights as clearly established law, another does not, and both express some doubt that the right exists at all. See *Newman*, 884 F.2d at 25; *Lum*, 876 F.2d at 1389. This result could not have been foreseen when this Court crafted in broad outlines a right to qualified immunity in actions under 42 U.S.C. Section 1983. See *infra* at 11. This Court should grant this petition to reaffirm that public employees with a property interest in continuing employment are guaranteed substantive due process by the Fourteenth Amendment.

THIS COURT HAS NOT SPECIFIED THE LAW WHICH DETERMINES WHETHER A DEFENDANT IN A CASE UNDER 42 U.S.C. §1983 IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE HIS CONDUCT DID NOT VIOLATE CLEARLY ESTABLISHED LAW. THE COURT SHOULD MAKE CLEAR THAT ITS PRECEDENT IS BINDING UNTIL OVERTURNED AND, IN THE ABSENCE OF PRECEDENT IN THEIR JURISDICTION, LOWER COURTS MUST DETERMINE WHAT THE LAW IN THEIR JURISDICTION WOULD HAVE BEEN AT THE TIME OF THE VIOLATION

Individual defendants³ in actions under 42 U.S.C. §1983 are entitled to qualified immunity from liability for damages if "their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982). Stated differently, a defendant is entitled to immunity unless his conduct violates clearly established constitutional rights and a reasonable official would know that what he was doing violated pre-existing law. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

This Court has not specified what the lower courts are to consider in determining if the law is "clearly established." But cf. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978) (examining precedent in this Court, the Ninth Circuit Court of Appeals and district courts in the Ninth Circuit where the violation occurred). The Circuits which

³ Local government entities have no qualified immunity in suits under 42 U.S.C. §1983. See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

have directly confronted the issue differ in the "law" to be considered in making this inquiry.

The First Circuit has held that, in the absence of binding authority from this Court or its Circuit, the law is not clearly established. See *Knight v. Mills*, 836 F.2d 659, 668-69 (1st Cir. 1987). But see *Estrada-Adorno v. Gonzalez*, 861 F.2d 304, 305-306 (1st Cir. 1988) (surveying law of sister Circuits).

The Third Circuit apparently applies "general legal principles" from at least this Court and the other Courts of Appeals. See *People of Three Mile Island v. Nuclear Regulatory Commission*, 747 F.2d 139, 144 & 146-47 (3d Cir. 1984).

In *Wallace v. King*, the Fourth Circuit held it was to consider precedent from this Court, the "appropriate" Court of Appeals and the highest State Court in which the violation occurred. 626 F.2d 1157, 1161 (4th Cir. 1980), cert. denied, 451 U.S. 969 (1981). The Fourth Circuit considered the "appropriate" Court of Appeals to be the Fourth Circuit. *Id.*

The Sixth Circuit has adopted three apparently conflicting standards. Compare *Masters v. Crouch*, 872 F.2d 1248, 1251-52 (6th Cir. 1989) (this Court, Sixth Circuit, other courts within the Circuit and other Courts of Appeals) with *Ohio Civil Service Employees Association v. Seitzer*, 858 F.2d 1171, 1177 (6th Cir. 1988) (this Court, Sixth Circuit and district courts in the Sixth Circuit; remaining Courts of Appeals only if issue is "clearly foreshadowed") and *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988) (adopting the reasoning of *Wallace v. King*, supra, but interpreting it to allow consideration of any

precedent in the Courts of Appeals). Cf. *Tucker v. Callahan*, 867 F.2d 909, 913 (6th Cir. 1989) (relying on Ninth Circuit precedent to find clearly established law).

The Seventh Circuit has intimated both that the inquiry is restricted to examination of precedent in this Court and its Circuit alone, see *Colaizzi v. Walker*, 812 F.2d 304 (7th Cir. 1987), and that precedent in this Court and any Court of Appeals is to be considered. See *Powers v. Lightner*, 820 F.2d 818 (7th Cir. 1987). See also *Rokovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc) (approving *Powers* standard).

The Ninth Circuit seems to have dealt with the problem in the greatest depth. It examines all available case law. See *Tribble v. Gardner*, 860 F.2d 321, 323 (9th Cir. 1988). The right can be clearly established even in the absence of Ninth Circuit precedent. See *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 2016 (1988). In the absence of precedent, the court is to evaluate the decision the Ninth Circuit or this Court would have reached if presented with the question. See e.g., *Wood v. Ostrander*, 851 F.2d 1212, 1217-19 (9th Cir. 1988) (applying Seventh Circuit precedent and concluding Ninth Circuit would follow its analysis). But see *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1113 (9th Cir. 1988) (absent a Ninth Circuit analysis, the law is not clearly settled); *Todd v. United States*, 849 F.2d 365, 371 n. 10 (9th Cir. 1988) (court exercising jurisdiction over the denial of summary judgment on qualified immunity grounds, see *Mitchell*, 472 U.S. at 530, exceeds its jurisdiction if it "establishes law.") Cf. *Capoeman*, 754 F.2d at 1514 (court "may consider" how this Court and the Ninth Circuit would have ruled).

The Eleventh Circuit has not expressly identified the law to be reviewed but has noted that a single district court decision from another Circuit is an insufficient basis for finding clearly established law. See *Muhammad v. Wainwright*, 839 F.2d 1422, 1425 (11th Cir. 1987).

The Courts of Appeals are similarly divided over the effect of a split in the Circuits on the question of clearly established law. See generally *People of Three Mile Island*, 747 F.2d at 144 (noting this Court has not ruled on the effect of a split in the Circuits on the question).

The Tenth Circuit has held that, if faced with disarray in the Courts of Appeals and no precedent in this Court, the panel must determine for itself what the law would have been in its Circuit had the issue been addressed. See *Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 1220 (1988). The Seventh Circuit has held that, in the absence of precedent in this Court or its Circuit, a split in the Circuits automatically precludes a finding that the law was clearly established. See *Smart v. Simonson*, 867 F.2d 429, 433 (1989); *Bensen v. Allphin*, 786 F.2d 268, 275 n.16 (7th Cir.), cert. denied, 479 U.S. 848 (1986). The Ninth Circuit aligned itself with the Seventh Circuit in the present case.

The position adopted by the Seventh and Ninth Circuits means there will be no remedy for violations of substantive due process in those Circuits until this Court squarely addresses the issue. This is precisely the objection noted in *Garcia*. 817 F.2d at 658. "This is not to say, of course, that such a right does not exist; it may very well, but only in a conceptual vacuum." Rudovsky, "*Anderson v. Creighton*: Another Turn of the Screw" 77 in 4 Civil

Rights Litigation Handbook (1988 ed.). Consigning constitutional rights to a vacuum is inconsistent with the "unflagging obligation" of federal courts to exercise their jurisdiction to remedy violations of those rights. See *Tovar v. Billimeyer*, 609 F.2d 1291, 1293 (9th Cir. 1980) quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976). It is likewise inconsistent with the obligation of the Circuits in other contexts to determine the law in the absence of binding precedent. See, e.g., *Daily v. Parker*, 152 F.2d 174, 177 (7th Cir. 1945) (obligation to predict state law in the absence of precedent in diversity cases).

If the position adopted by the Seventh and Ninth Circuits prevails, the constitutional rights of State employees will simply freeze where they are today as a result of a convergence of five lines of cases:

(1) A plaintiff in a case under 42 U.S.C. § 1983 is not entitled to injunctive relief unless he can demonstrate the constitutional violation will reoccur. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). (2) A plaintiff is not entitled to declaratory relief unless he can demonstrate the constitutional violation will reoccur. See *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 (1977) (per curiam). (3) An individual defendant may avoid liability for damages unless the law is clearly settled. See *Harlow*. (4) If the plaintiff can establish no claim for damages against the individual defendant, he can state no claim that the government entity's regulations permitted unconstitutional conduct. See *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). (5) The States and individuals acting in official state capacities are not persons under 42 U.S.C. § 1983. See

Will v. Michigan Department of State Police, ___U.S. ___, ___, 109 S.Ct. 2304, 2312 (1989).

New constitutional decision-making involving state employees would occur only when the state has an officially adopted policy which applies generally, *e.g.*, a statute. Absent a statute, a single decision by a policy-making state official, *see generally City of St. Louis v. Praprotnik*, ___U.S. ___, 108 S.Ct. 915 (1988), would not be grounds for relief unless the law was clearly established in the Circuit. If a split in the Circuits means the law is not clearly established, then the official has individual qualified immunity, the State cannot be sued, the official cannot be sued in his official capacity and the plaintiff (who has now been injured) cannot demonstrate the conduct will occur again.

If the Circuits are not required to establish internal precedent, the development of constitutional law concerning State employees will simply end in the Courts of Appeals. Absent a decision from this Court, all that will remain are actions for declaratory and injunctive relief attacking the constitutionality of statutes and damages claims based solely on the law as it exists today. This Court will become not only the final arbiter but the sole arbiter of constitutional rights. This Court must act in this case to prevent the further "Balkaniz[ation] [of] the rule of qualified immunity" it sought to avoid in *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

CONCLUSION

Petitioner lost his employment in violation of the Fourteenth Amendment's guarantee that he would not be deprived of property without due process of law. The Ninth Circuit Court of Appeals has held this deprivation did not violate clearly established law and Petitioner accordingly has no remedy. The Ninth Circuit did not follow binding precedent from this Court. Assuming precedent is unclear, the panel's determination that a split in the Courts of Appeals precludes a finding of clearly established law abdicates its obligation to implement the remedy provided by Congress to enforce Constitutional rights.

Petitioner respectfully asks this Court to issue a writ of certiorari to reestablish the primacy of its precedent, to clarify the standards to be applied in ruling on qualified immunity issues in cases under 42 U.S.C. § 1983 and to reinforce the obligation of the Courts of Appeals to implement this remedy for violation of Constitutional rights.

Dated: November 9, 1989

Respectfully submitted,

Counsel for Petitioner

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MERRILL & ASSOCIATES
CHARLES C. MERRILL

APPENDIX
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP W. L. LUM)	
Plaintiff-Appellee,)	No. 87-2896
)	
v.)	D.C. #CV-86-0134-RAR
)	
RAYMOND JENSEN,)	
ROBERT DRAKE, and THE)	ORDER
STATE OF CALIFORNIA,)	
Defendants-Appellants.)	(Filed Aug. 11, 1989)
_____)	

Before: CHOY, CANBY and NORRIS, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Canby and Norris vote to reject the suggestion for rehearing en banc and Judge Choy so recommends.

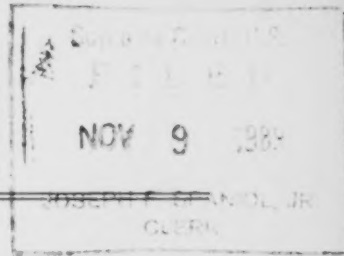
The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.



89 - 868

No. _____



In The
Supreme Court of the United States
October Term, 1989

PHILIP W. L. LUM,

Petitioner,

v.

RAYMOND JENSEN, ROBERT DRAKE, and
STATE OF CALIFORNIA,

Respondents.

**SUPPLEMENTAL APPENDIX TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

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Philip W.L. LUM, Plaintiff-Appellee,

v.

Raymond JENSEN, Robert Drake, and
the State of California,
Defendants-Appellants.

No. 87-2896.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 13, 1988.

Decided May 31, 1989.

Former California civil service employee filed action against his former supervisors for procedural due process violation and general and punitive damages. On defendants' motion for summary judgment, the United States District Court for the Eastern District of California, Raul A. Ramirez, J., denied defendants' motion for summary judgment in part ruling there were triable issues of fact as to whether they violated a clearly established constitutional right, and they appealed. The Court of Appeals, Choy, Circuit Judge, held that because there was conflict among other circuits and no case law in the Ninth Circuit at time of alleged constitutional violation, defendants could not have known they were violating clearly established constitutional right and were entitled to qualified immunity.

Reversed.

Civil Rights 13.8(2)

Supervisors of a state employee were entitled to qualified immunity from his substantive due process claim that his termination was arbitrary; at the time employee was fired there was no clearly established substantive

due process right to continued public employment that would preclude arbitrary, capricious and pretextual termination in light of absence of binding precedent in Ninth Circuit and conflict between other circuits. 42 U.S.C.A. § 1983.

Vincent J. Scally, Jr., Deputy Atty. Gen., Sacramento, Cal., for defendants-appellants.

James R. Kirby, Segal & Kirby, Sacramento, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before CHOY, CANBY and NORRIS, Circuit Judges.

CHOY, Circuit Judge:

Raymond Jensen and Robert Drake (collectively referred to as "defendants"), employees of the California Department of Justice, appeal from the district court's denial of their claim to qualified immunity in a 42 U.S.C. § 1983 suit brought by Philip Lum. The district court denied the defendants' motion for summary judgment, in part ruling that there were triable issues of fact as to whether the defendants had violated a clearly established constitutional right. We have jurisdiction over this interlocutory appeal under *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817-18, 86 L.Ed.2d 411 (1985). We reverse, concluding that because there was a conflict among the other circuits and no case law in this circuit at

the time of the alleged constitutional violation, the defendants could not have known they were violating a clearly established constitutional right of the plaintiff. Thus, the defendants are entitled to qualified immunity as a matter of law.

BACKGROUND

Philip Lum was employed by the California Department of Justice as a criminalist, a civil service position. Raymond Jensen was Lum's supervisor and Robert Drake was Bureau Chief of Lum's division. On April 24, 1984, Lum was placed on paid administrative leave. On May 4, 1984, Lum was served with a Notice of Adverse Action terminating him from the Department of Justice effective May 18, 1984. On two previous occasions, Lum had met with the defendants to discuss Lum's job performance.

Lum appealed his termination to the State Personnel Board and the Board ordered Lum reinstated with back pay and benefits. He returned to work on September 3, 1985. On January 26, 1986, Lum filed a complaint alleging a procedural due process violation and requesting general and punitive damages. On June 9, 1986, Lum filed an amended complaint, alleging denial of both procedural and substantive due process. He claimed that the defendants denied him substantive due process because his termination was arbitrary, capricious, and pretextual.

On July 27, 1987, the defendants filed a motion for summary judgment seeking dismissal of both the procedural and substantive due process claims. They asserted the defense of qualified immunity on the ground

that they had violated no clearly established constitutional right. On October 5, 1987, the district court issued an order granting summary judgment to the defendants on the procedural due process claim but denying the defendants' motion as to the substantive due process claim and the qualified immunity defense. The district court also denied Lum's motion for summary judgment, ruling that triable issues of fact existed as to whether the defendants' termination of Lum had been arbitrary, capricious, and pretextual.

On October 28, 1987, the defendants filed a timely appeal from the order denying their motion for summary judgment. They argue that at the time Lum was fired, there was no clearly established substantive due process right to continued public employment that would preclude an arbitrary, capricious, and pretextual termination. They contend that because there was no clearly established right, they were entitled to qualified immunity as a matter of law.¹

DISCUSSION

I. *Qualified Immunity in General*

Government officials who perform discretionary functions are protected from liability for civil damages as

¹ The defendants also argue that Lum is not entitled to relief because he was reinstated and awarded back pay and thus there was no *final* deprivation of his rights. Because we hold that there was no clearly established substantive due process right at the time of Lum's termination, we need not address this argument.

long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). To defeat qualified immunity, Lum must allege violation of more than an abstract right to due process. He must allege violation of a right that has been "'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

The district court's determination regarding immunity is reviewed de novo. *Tribble v. Gardner*, 860 F.2d 321, 323 (9th Cir. 1988). On an interlocutory appeal, the appellate court "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Mitchell*, 472 U.S. at 528, 105 S.Ct. at 2816. Review in a case like the instant one is limited to determining, as a matter of law, "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Id.*

In determining whether officials are entitled to qualified immunity, officials are charged with knowledge of constitutional developments at the time of the alleged constitutional violation, including all available case law. *Tribble*, 860 F.2d at 324. A right can be clearly established even though there was no binding precedent in this circuit. *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir.1987),

cert. denied, ___ U.S. ___, 108 S.Ct. 2016, 100 L.Ed.2d 603 (1988). Absent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established. We also evaluate the likelihood that this circuit or the Supreme Court would have reached the same result as courts that had already considered the issue. *Chilicky v. Schweiker*, 796 F.2d 1131, 1138 (9th Cir.1986), *rev'd on other grounds*, ___ U.S. ___, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988).

II. Clearly Established Nature of the Right

Lum alleges that his substantive due process right was violated by an arbitrary, capricious, and pretextual discharge. At the time of Lum's termination, there was clear precedent in some circuits establishing substantive due process protection when a public employee could establish a property interest in his employment. For example, the Second Circuit had ruled that to meet the requirements of substantive due process, actions impairing a tenured teacher's property interest in continued employment must have a rational relation to a proper governmental purpose. *Gargiul v. Tompkins*, 704 F.2d 661, 668 (2d Cir.1983), *vacated on other grounds*, 465 U.S. 1016, 104 S.Ct. 1263, 79 L.Ed.2d 670 (1984). The Fifth Circuit had determined that public employees who had a property interest in continued employment could establish a denial of substantive due process if they could prove their terminations were the result of arbitrary and capricious action. *Thompson v. Bass*, 616 F.2d 1259, 1267 (5th Cir.1980), *cert. denied*, 449 U.S. 983, 101 S.Ct. 399, 66 L.Ed.2d 245 (1980). The Tenth and Eleventh Circuits also

had clear case law recognizing such a right. *Brenna v. Southern Colorado State College*, 589 F.2d 475, 476-77 (10th Cir.1978); *Barnett v. Atlanta Housing Authority*, 707 F.2d 1571, 1577-78 (11th Cir.1983).

There was no Ninth Circuit precedent which established an entitlement to substantive due process protection for public employment. In *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir.1976), a case in which the plaintiffs argued that a college had denied a professor substantive due process by firing her in violation of its own tenure policy, we did not reach the issue of whether substantive due process applied. Instead, we determined that because the professor's property interest was based on *de facto* tenure, the contours of the professor's rights were determined by the representations the college had made to her concerning her employment. *Id.* at 249.

Case law in the remaining circuits either left the issue open, summarily addressed the issue and found no violation, or held explicitly that there was no substantive due process right. The First and Third Circuits refused to address whether such a right existed, expressly leaving the question open because the cases presenting the question did not involve a property interest sufficient to trigger any due process protection. *Perkins v. Board of Directors of School Administrative Dist. No. 13*, 686 F.2d 49, 51 n. 5 (1st Cir.1982) (no need to decide whether right exists because no constitutionally protected property right); *McKnight v. Southeastern Pennsylvania Transp. Auth.*, 583 F.2d 1229, 1233 n. 4 (3d Cir.1978) (no need to reach issue because court remanded for determination whether property right existed).

Cases from the Fourth and Sixth Circuits provided only meager support, if any, for a substantive due process right. In *Kowtoniuk v. Quarles*, 528 F.2d 1161, 1165 (4th Cir.1975), a college teacher claimed his dismissal violated substantive due process. The Fourth Circuit never discussed the nature of the protection afforded the plaintiff under substantive due process. Instead, the court limited its inquiry to determining whether the district court had committed clear error in finding that there was substantial evidence to support the college committee's decision to sustain the discharge. In *Parham v. Hardaway*, 555 F.2d 139, 142 (6th Cir.1977), the Sixth Circuit simply affirmed the district court's determination that a discharge was not arbitrary or capricious without discussing whether a substantive due process right existed.

In the Eighth Circuit, the existence of a substantive due process right to continued public employment was an open question. In *Buhr v. Buffalo Public School Dist. No. 38*, 509 F.2d 1196 (8th Cir.1974), the Eighth Circuit ruled that the plaintiff must at least have a property or liberty interest which was sufficient to trigger procedural due process before substantive due process would apply. *Id.* at 1202. Since the plaintiff in *Buhr* did not have a property or liberty interest which would suffice to give rise to procedural due process protection, the Eighth Circuit did not further consider the attributes of a substantive due process right. The court stated only that "to the extent that our cases recognize a constitutional right to substantive due process, that right . . . 'is no greater than the right to procedural due process.'" *Id.* at 1202 (quoting *Jeffries v. Turkey Run Consolidated School Dist.*, 492 F.2d 1, 4 (7th Cir.1974) (emphasis in original)).

The Eighth Circuit addressed the merits of a substantive due process claim in *Miller v. Dean*, 552 F.2d 266, 268 (8th Cir.1977). Without dealing with whether a right to substantive due process existed, the court found no violation because the decision to terminate was not arbitrary and capricious. Subsequently, in *Moore v. Warwick Public School Dist. No. 29*, 794 F.2d 322 (8th Cir.1986), the Eighth Circuit stated that

the concept of substantive due process has been alluded to by this Court in prior decisions. As yet, there is no clear consensus whether this Circuit will recognize a substantive due process right to be free from arbitrary and capricious state action. . . . [T]he law [in] this Circuit remains unclear.

Id. at 328-29 (citations omitted). *Moore* was decided after Lum's termination and thus the court's statement that a conflict existed within the Eighth Circuit is not controlling here. We find that statement somewhat relevant, however, in determining that the Eighth Circuit had not recognized substantive due process protection for public employment prior to Lum's termination.

The Seventh Circuit left the issue of substantive due process protection open in *Jeffries v. Turkey Run Consolidated School Dist.*, 492 F.2d 1, 4 (7th Cir.1974). Later, in *Brown v. Brien*, 722 F.2d 360 (7th Cir.1983), the Seventh Circuit ruled that there would be no substantive due process protection for state-created property interests in employment. *Id.* at 366-67.

As the foregoing survey indicates, the law in many of the circuits was unsettled at the time of Lum's termination. The Seventh Circuit, which expressly had rejected a

substantive due process right for public employment, was in conflict with the four circuits that had recognized a substantive due process right. In *Moore*, however, the Eighth Circuit finally recognized a right to substantive due process, citing the Supreme Court's decision in *Harrah Independent School Dist. v. Martin*, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979) (per curiam), as providing "some guidance" in this area. 794 F.2d at 329. According to the Eighth Circuit, the Supreme Court in *Harrah* "implicitly, if not necessarily, recognized a substantive due process right to be free from arbitrary and capricious state action." *Id.* When there is no binding precedent on an issue, a part of our task under the qualified immunity analysis is to determine whether this circuit or the Supreme Court would have followed the precedent of other circuits. Thus, we examine *Harrah* to determine whether it provides a clear indication that the Supreme Court would have resolved the intercircuit conflict in favor of recognizing a substantive due process right.

In *Harrah*, a school board voted not to renew a tenured teacher's contract because she refused to comply with the board's continuing education requirement. The Supreme Court stated that the Due Process Clause offers procedural safeguards to protected interests and "protects substantive aspects of liberty against impermissible governmental restrictions." 440 U.S. at 197, 99 S.Ct. at 1063. The Court applied a rational basis scrutiny to the board's decision not to renew the contract. Since the decision could not be viewed as arbitrary, the Court rejected the teacher's substantive due process claim as "wholly untenable." *Id.* at 199, 99 S.Ct. at 1064.

By applying a rational basis standard and reaching the merits of the teacher's claim, the Court did suggest that substantive due process would apply in the area of public employment. The Court, however, only summarily addressed the existence of a substantive due process right. In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985), decided subsequent to *Harrah* and to Lum's termination, the Supreme Court assumed without deciding that the plaintiff, a student who had been denied continued college enrollment, had asserted a property interest which gave rise to a substantive due process right. The Court went on to determine that the University had not acted arbitrarily. *Id.* at 223, 106 S.Ct. at 512. Justice Powell, concurring separately, rejected the notion of substantive due process protection for any state-created property interests. *Id.* at 229, 106 S.Ct. 515-16 (Powell, J., concurring). The Court's reluctance to recognize substantive due process protection outright in *Ewing* demonstrates that the Court is still uncertain as to the nature of substantive due process protection. Justice Powell's concurring opinion also casts some doubt on the existence of a substantive due process right in the area of public employment.

The circuits disagree as to whether inter-circuit conflict on a point of law negates the clearly established nature of a right. The Tenth Circuit has stated that the presence of a conflict "is relevant to the *Harlow* inquiry, but not controlling." *Garcia by Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988); see also *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144 (3d Cir.1984) (noting the ambiguous state of the law on the

effect of a conflict). The Seventh Circuit, on the other hand, appears to follow the rule that if there is a conflict among the circuits, the law will not be clearly established until there is a definitive resolution of the conflict by the Supreme Court. *Benson v. Allphin*, 786 F.2d 268, 275 n. 16 (7th Cir.), *cert. denied*, 479 U.S. 848, 107 S.Ct. 172, 93 L.Ed.2d 109 (1986).

In our view, the absence of binding precedent in this circuit plus the conflict between the circuits is sufficient, under the circumstances of this case, to undermine the clearly established nature of a right. Though they are charged with knowledge of constitutional developments, government officials are not required to predict the future course of constitutional law. *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1465 (9th Cir.1984) (quoting *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000-01, 43 L.Ed.2d 214 (1975)). At the time of Lum's termination, there was a conflict among the circuits that had reached the issue and the law was unsettled in this and the remaining circuits. Absent a more explicit direction from the Supreme Court than that provided in *Harrah*, we are unable to say that the precedent in favor of a substantive due process right ~~was~~ sufficient to overcome the otherwise unsettled and contradictory case law. Thus, we conclude that there was no clearly established constitutional right to substantive due process protection of continued public employment.

CONCLUSION

We hold that there was no clearly established constitutional right to substantive due process protection for

Lum at the time of his termination and that the defendants are entitled to qualified immunity as a matter of law. Therefore, we reverse and direct the entry of summary judgment in favor of the defendants.

REVERSED.

No. 89-868

3

Supreme Court, U.S.

FILED

DEC 28 1989

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

PHILIP W. L. LUM,

Petitioner,

v.

RAYMOND JENSEN, ROBERT DRAKE, and
STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In 1984, was the law clearly established that a public employee with a property interest in continued employment was entitled to substantive due process protection from an arbitrary, capricious, and pretextual termination?

2. Absent binding authority, is a lower court in an action under 42 U.S.C. section 1983 required to ascertain what the law in its jurisdiction would have been at the time of the alleged violation in determining if a defendant is entitled to qualified immunity because his conduct did not violate clearly established law?

3. What law is a court required to consider in determining if the conduct of a defendant in an action under 42 U.S.C. section 1983 violated clearly established law?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondents Raymond Jensen and Robert Drake hereby submit their brief in opposition to the petition for a writ of certiorari, which seeks review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

A. Summary of Material Facts

Philip Lum was employed by the California Department of Justice as a criminalist, a civil service position. Raymond Jensen was Lum's supervisor and Robert Drake was Bureau Chief of Lum's division. On April 24, 1984, Lum was placed on paid administrative leave. On May 4, 1984, Lum was served with a Notice of Adverse Action terminating him from the Department of Justice effective May 18, 1984. On two previous occasions, Lum had met with the defendants to discuss Lum's job performance.

Lum appealed his termination to the State Personnel Board and the Board ordered Lum reinstated with back pay and benefits. He returned to work on September 3, 1985.

B. Summary of Procedural History

On January 26, 1986, Lum filed a complaint alleging a procedural due process violation and requesting general and punitive damages. On June 9, 1986, Lum filed an amended complaint, alleging denial of both procedural

and substantive due process. He claimed that the defendants denied him substantive due process because his termination was arbitrary, capricious, and pretextual.

On July 27, 1987, the defendants filed a motion for summary judgment seeking dismissal of both the procedural and substantive due process claims. They asserted the defense of qualified immunity on the ground that they had violated no clearly established constitutional right. On October 5, 1987, the district court issued an order granting summary judgment to the defendants on the procedural due process claim but denying the defendants' motion as to the substantive due process claim and the qualified immunity defense. The district court also denied Lum's motion for summary judgment, ruling that triable issues of fact existed as to whether the defendants' termination of Lum had been arbitrary, capricious, and pretextual.

On October 28, 1987, the defendants filed a timely appeal to the Ninth Circuit Court of Appeals from the order denying in part their motion for summary judgment. They argued that at the time Lum was fired, there was no clearly established substantive due process right to continued public employment that would preclude an arbitrary, capricious, and pretextual termination. They contended that because there was no clearly established right, they were entitled to qualified immunity as a matter of law.

On May 31, 1989, the Ninth Circuit Court of Appeals issued its decision and reversed the district court order. *Lum v. Jensen*, 896 F.2d 1385 (9th Cir. 1989). It held that there was no clearly established right to substantive due

process protection for Lum at the time of his termination and that the defendants were entitled to qualified immunity as a matter of law. The Court of Appeals directed summary judgment in defendants' favor.

On August 11, 1989, Lum's petition for rehearing was denied, and the suggestion for a rehearing en banc was rejected.

REASONS WHY THE WRIT SHOULD BE DENIED

I -

THE COURTS OF APPEALS ARE NOT IN CONFLICT OVER WHETHER OR NOT CLEARLY ESTABLISHED LAW GUARANTEES SUBSTANTIVE DUE PROCESS UNDER THE 14TH AMENDMENT TO PUBLIC EMPLOYEES WITH A PROPERTY INTEREST IN CONTINUING EMPLOYMENT

Petitioner argues that this Court should grant review because, he claims, the Courts of Appeals are divided over whether or not the law is clearly established that substantive due process protects public employees with a property interest in continuing employment. Petitioner also argues that the Ninth Circuit ignored this Court's precedent which he claims holds that substantive due process protects public employees with a property interest in continuing employment. Petitioner requests this Court to grant the writ in order "to reaffirm" that public employees with a property interest in continuing employment are guaranteed substantive due process protection and resolve the "division" among the circuits.

No such division exists. Notwithstanding petitioner's arguments, this Court's review is unwarranted and the writ should be denied. The Circuit Courts of Appeals are not in conflict over whether the law is clearly established that substantive due process protects public employees with a property interest in continuing employment. The only two circuit courts which have addressed the issue of whether the law is clearly established are consistent, not divided, on this issue. Also, this Court has never held that substantive due process protects public employees with a property interest in continuing employment. Therefore, this Court need not grant the writ in order "to reaffirm" prior precedent on this issue.

A. The Circuit Courts of Appeals Are Not In Conflict as to Whether The Law Is Clearly Established That Substantive Due Process Protects Public Employees With A Property Interest In Continuing Employment.

Contrary to petitioner's argument, the Circuit Courts of Appeals are not in conflict as to whether the law is clearly established that substantive due process protects public employees with a continuing interest in employment. Only two circuits have addressed the issue whether the law is clearly established; those decisions are consistent with each other.

The Ninth Circuit, of course, in its opinion below, addressed the issue of whether the law is clearly established and concluded that in 1984 there was no clearly established constitutional right to substantive due process protection of continued public employment. In

addressing the issue, the Ninth Circuit reviewed the decisions of this Court, the Ninth Circuit, and other Circuit Courts of Appeals. *Lum v. Jensen*, *supra*, 876 F.2d at 1387-1389. Through its review, the lower court concluded that there was no Supreme Court or Ninth Circuit precedent which established an entitlement to substantive due process protection for public employment. Its survey of the other circuits indicated that there was a conflict among the circuits that had reached the issue and the law was unsettled in the Ninth and the remaining circuits. Thus it concluded that there was no clearly established constitutional right to substantive due process protection of continued public employment in 1984.¹

The only other circuit court which has addressed the issue of whether the law is clearly established is the First Circuit in *Newman v. Commonwealth of Massachusetts*, 884 F.2d 19 (1st Cir. 1989), which considered the state of the law in 1983. In addressing the issue, the First Circuit also reviewed the decisions of this Court, the First Circuit, and the other Circuit Courts of Appeals. As did the Ninth Circuit in its decision below, the First Circuit concluded that there was no Supreme Court precedent which has established substantive due process protection for continuing public employment. Its survey of the other Circuit Courts of Appeals demonstrated the same conflict found by the Ninth among the circuits which had addressed the issue of whether substantive due process

¹ The lower court's opinion identified no cases which had addressed the issue of whether the law is clearly established, as distinct from the issue whether substantive due process protects continued public employment.

protection continued public employment. However, in reviewing the decisions of its own circuit, the First Circuit found clear precedent that there was substantive due process protection for continued public employment.

Upon its own precedent, the First Circuit held that the law was clearly established *in the First Circuit only* that there was substantive due process protection. On that basis, the First Circuit distinguished the Ninth Circuit's decision in *Lum v. Jensen*. The *Newman* court noted that the Ninth Circuit had addressed the issue of whether the law is clearly established and had concluded that in 1984 there was no clearly established constitutional right. But the *Newman* court found that its case was clearly distinguishable from *Lum* because of two First Circuit opinions which it deemed direct precedent. *Newman v. Commonwealth of Massachusetts*, *supra*, 884 F.2d at 25, fn. 8.

Thus the only two circuits which have addressed the issue of whether a clearly established right exists are consistent with each other. The Ninth Circuit found there was no clearly established constitutional right and the First Circuit found a clearly established right only in the First Circuit, distinguishing the decision in *Lum v. Jensen* on that basis. As there is no division in the Circuit Courts of Appeals on the issue of whether the law is clearly established, then this Court's review is unwarranted.

B. No Supreme Court Precedent Establishes That Substantive Due Process Protects Continued Public Employment

Supreme Court review is also unwarranted in order "to reaffirm" prior Supreme Court precedent on the issue

of whether substantive due process protects continued public employment. As both the First and Ninth Circuit Courts have held, there is no Supreme Court precedent which holds that substantive due process protects continued public employment. No circuit court has determined that Supreme Court precedent holds that substantive due process protects continued public employment. Therefore, petitioner's request to grant review in order "to reaffirm" that substantive due process protects continued public employment should be rejected because this Court has never so held.

As both the First and Ninth Circuits have concluded, there is a split in the circuits with respect to whether substantive due process protects continuing public employment, as distinct from whether the law is clearly established that such protection exists. See *Lum v. Jensen*, *supra*, 876 F.2d at 1388 and *Newman v. Commonwealth of Massachusetts*, *supra*, 884 F.2d at 25. However, this Court need not and should not resolve that split in this case because the distinct issue presented here is *whether the law was clearly established in 1984* that substantive due process protects continuing public employment, not whether substantive due process presently does or should provide such protection for continuing public employment. Even if this Court were to hold in this case that substantive due process protection exists for continuing public employment, that would not affect the holding of the Ninth Circuit, which is that in 1984 there was no clearly established law on the question and the defendants were therefore entitled to qualified immunity.

Moreover, even if this Court were to grant review and hold that in 1984 clearly established law provided

substantive due process protection for continued public employment, the result in this case would yet remain unchanged. In the lower court defendants argued not only that there was no clearly established constitutional right to continued public employment but also argued that Lum was entitled to no relief because he was reinstated and awarded back pay and thus there was no final deprivation of his rights. The court did not address this argument because it held that there was no clearly established substantive due process protection for public employment at the time of Lum's termination. See *Lum v. Jensen, supra*, 876 F.2d at 1386, fn. 1. No case of this Court, of any circuit court, or of any district court has ever held or even intimated that substantive due process protects a public employee who is terminated but reinstated with back pay. All of the authority petitioner has cited in this Court and the lower court concerns public employees who were finally, or conclusively, deprived of their public employment. Because under no theory of substantive due process would a public employee in Lum's circumstances be deemed to have been denied his rights, then the lower court's decision would stand. For that reason as well, review should be denied.

In conclusion, because the Courts of Appeals are consistent on the issue of whether the law is clearly established that substantive due process protects public employees with a property interest in continuing employment, then the petition for review should be denied. The only two circuits which have addressed the issue, the First and the Ninth, are consistent in their holdings concerning whether in 1984 the law was clearly established that substantive due process protects a property interest

in continuing public employment. Both circuits are consistent in concluding that this Court has never held that such substantive due process protection exists. Therefore, review in this case is unnecessary in order "to reaffirm" prior Supreme Court precedent.

II

THE WRIT SHOULD BE DENIED BECAUSE THIS COURT HAS SPECIFIED THE LAW THE LOWER COURTS ARE TO CONSIDER IN DETERMINING IF THE LAW IS CLEARLY ESTABLISHED AND BECAUSE THE NINTH CIRCUIT IN ITS DECISION BELOW DID CONSIDER WHETHER THE NINTH CIRCUIT OR THE SUPREME COURT WOULD HAVE FOLLOWED THE PRECEDENT OF OTHER CIRCUITS IN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED

Petitioner argues that the writ should be granted in order for this Court to specify the law which the lower courts are to consider in determining if the law is clearly established, and to require the lower courts, in the absence of precedent in their own jurisdiction, to determine what the law in their jurisdiction would have been at the time of the violation of the putative right. Review is unwarranted for these reasons because this Court has previously specified the law which the lower courts are to consider in determining if the law is "clearly established." Review is also unwarranted because the Ninth Circuit in this case, following Ninth Circuit precedent, did determine in its qualified immunity analysis whether the Ninth Circuit or the Supreme Court would have followed the precedent of other circuits at the time of the violation.

First, the Supreme Court has previously specified the law that the lower courts are to consider in determining whether the law is clearly established. The lower courts are to consider the opinions of this Court, of the Courts of Appeals, or the local district court. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Harlow v. Fitzgerald*, 475 U.S. 800, 818, fn. 32 (1982). By specifying the law which is to be considered in this analysis, this Court has never precluded consideration of other sources of law. No Circuit Courts of Appeals have limited the sources of law which are to be considered or precluded consideration of any source of law. Thus, the lower courts should consider Supreme Court, Court of Appeals, and District Court opinions, and may consider other sources which indicate whether or not the law is clearly established.

As petitioner correctly notes, the Ninth Circuit examines all available case law to determine whether a law is clearly established. See Petition, p. 13; *Tribble v. Gardner*, 860 F.2d 321, 323 (9th Cir. 1988). In this case the Ninth Circuit considered all available case law, reviewing the precedents of this Court, the Ninth Circuit, and the other Circuit Courts of Appeals. Petitioner specifies no source of law or available case law which the Ninth Circuit failed to consider in its analysis in this case.

Contrary to petitioner's assertion, the Circuit Courts of Appeals are undivided on the issue of what law the lower courts are to consider in determining whether the law is clearly established. Petitioner refers to decisions of various circuits in which the courts considered various sources of law or available case law. (See Petition, pp. 12-14.) None of these cases holds that the lower courts in

qualified immunity analysis may not consider any particular source or available case law. In the decisions petitioner cites, the lower courts may have considered different or varying sources of law or available case law. Those differences are simply a function of what law was available and pertinent to the question presented in each case. None of the cases held that any particular source or case law could not be considered in its analysis. Any variations in the cases cited occurred because of the circumstances in each case. The cases demonstrate no division among the Circuit Courts of Appeals on the issue of what law the lower courts are to consider in the qualified immunity analysis. Therefore, this Court need not grant review to consider this issue.

Supreme Court review is also unwarranted in order to require the lower courts, in the absence of precedent in their jurisdictions, to determine what the law in their jurisdictions would have been at the time of the violation. The lower court in this case, consistent with Ninth Circuit precedent, did determine, in the absence of precedent in the Ninth Circuit, whether the Ninth Circuit or the Supreme Court would have followed the precedent of other circuits. Contrary to petitioner's assertion (see Petition, p. 14), the lower court in this case did not hold that the split among the Circuit Courts of Appeals on the issue of whether substantive due process protects the property interest and continuing public employment "automatically" determined that the law is not clearly established.

In considering whether the law was clearly established in 1984, the lower court in this case stated that "when there is no binding precedent on an issue, a part of

our task under the qualified immunity analysis is to determine whether this circuit or the Supreme Court would have followed the precedent of other circuits. Thus, we examine *Harrah* to determine whether it provides a clear indication that the Supreme Court would have resolved the inter-circuit conflict in favor of recognizing the substantive due process right." *Lum v. Jensen*, 876 F.2d at 1388-89. The lower court then analyzed the *Harrah* decision as well as this Court's decision in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), to conclude that this Court is still uncertain as to the nature of substantive due process protection. That determination was part of the lower court's qualified immunity analysis.

The lower court did not conclude "automatically" that the law was not clearly established because of the inter-circuit conflict on the issue of whether substantive due process protection exists in the area of public employment. The lower court noted that the circuits disagree as to whether inter-circuit conflict on a point of law negates the clearly established nature of a right, noting that the Tenth Circuit has stated that the presence of a conflict is relevant to the qualified immunity inquiry, but not controlling, but that one Seventh Circuit opinion has stated that if there is a conflict among the circuits, the law will not be clearly established until there is a definitive resolution of the conflict by the Supreme Court. See *Lum v. Jensen*, *supra*, 876 F.2d at 1389. The lower court did not assume that the inter-circuit conflict negates the clearly established nature of a right. In reaching that conclusion, the court considered not only the conflict between the circuits that had reached the issue of substantive due

process protection, but also the absence of binding precedent in the Ninth Circuit, the unsettled state of the law in the remaining circuits, and the absence of explicit direction from the Supreme Court. In light of all those considerations, the lower court concluded that there was no clearly established constitutional right to substantive due process protection of continued public employment. Because the lower court in this case did conduct the analysis which petitioner would have this Court require of all the circuits, then the decision in this case would remain the same even should this court grant review. Therefore, review is unwarranted.

In conclusion, this Court's review of the lower court decision is unwarranted. First, this Court has made clear what sources of law the lower courts are to consider in the qualified immunity analysis. None of the lower courts have in any way limited the sources of law which are to be considered in this analysis. There is no division among the Circuit Courts of Appeals on this issue. Second, review in this case is unwarranted because the lower court in this case, as part of its qualified immunity analysis, did determine whether the Ninth Circuit would have followed the precedent of other circuits, conducting the very analysis which petitioner would ask this Court to impose on all the circuits. Thus, even if this Court required such a determination in the qualified immunity analysis, the result in this case would not change. Therefore, this Court should deny review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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